IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ALAN NANESS, Respondent, v. CANTERBURY SHORES APARTMENT OWNERS ASSOCIATION; JIM BAILEY, PRESIDENT; PAMELA PURVIS; JIM MERCER; ED LUTZ; LIBBY RODGERS; JOHN HANSEN; JOHN HUNT; ALEXIS ELLER; NANCY VAN RAVENZWAAY; MAUREEN MCGEE; LYNN COOK; and BILL MUNDY, Appellants.	)	No. 63091-1-I DIVISION ONE UNPUBLISHED OPINION FILED: April 12, 2010

BECKER, J. — The issue in this appeal is whether the trial court erred in granting plaintiff a new trial on the basis of juror misconduct. The plaintiff claimed that his condominium association provided inaccurate information concerning his unit in connection with a purchase and sale agreement and thereby caused the sale to fall through. During deliberations, two jurors argued that the transaction was doomed from the beginning because the closing date had been set too early. The observations of these jurors did not amount to extrinsic evidence. We conclude there was no juror misconduct and the defense

verdict must be reinstated.

Appellant Alan Naness owned two adjoining units in the Canterbury Shores apartment complex in Seattle. In 1998, with the approval of the board of the condominium association, he combined the two units, numbered 407 and 408, into a single residence. At the time, one of the other homeowners questioned if this could be done without following certain procedures specified in the condominium declaration, including securing a favorable vote of the membership. The Board concluded that no vote of the homeowners was necessary and that the units could continue as separate. Naness was so advised.

On January 19, 2005, Dr. George Frank made an offer to purchase the Naness residence for $1,475,000. Naness accepted the offer on January 20, 2005. The agreement set a closing date of January 28, 2005. Frank's house had just been sold. He wanted to buy a residence he could move into immediately so that he would not have to find an interim rental and then move twice.

Frank thought that the Naness residence was legally one unit. When Frank learned that the units had never legally been combined, the deal fell through. Eventually Naness sold the residence to another buyer for a lower price.

Naness sued Canterbury Shores in December 2006. He alleged that the sale to Frank failed because Canterbury Shores issued a condominium resale

certificate containing inaccurate information. Under a statute regulating the resale of condominiums, condominium associations must provide certain disclosures to prospective buyers. RCW 64.34.425. Tracy Bates, acting for the Canterbury Shores Apartment Owners Association, prepared a condominium resale certificate concerning the proposed sale on January 24, 2005. She wrote: "Note that it does not appear that the combining of units 407 & 408 was officially amended or recorded. Owner may be responsible for costs associated with this if it has not been properly done." On January 26, 2005, Bates wrote a follow-up letter to Naness informing him that when the board of directors approved the remodel of the two units in 1998, it did not have authority to do so. "In order to uphold the Documents of the Canterbury Shores Owners Association, it will be necessary to proceed with taking the vote to the membership for approval and amending the documents. . . .The timeline for such a process is typically 5 months from start to finish and will cost approximately $1,750." Naness alleged that the information provided by Tracy Bates was inaccurate and it caused Frank to back out of the deal.

The case went to a jury trial in November 2008. The jury heard Frank testify by deposition. Frank said he became concerned that the closing would not occur on schedule when he learned that the residence consisted of two units rather than one. The information that the other homeowners would have to approve of the combining of the units was "one of many" concerns. Another concern was that his lender, Wells Fargo, was "not willing to lend a million

dollars on Unit 407 when there was a second unit that needed to be legally combined to make it a unit of that value."

The purchase and sale agreement was contingent on Frank's ability to obtain conventional financing for 75 percent of the purchase price. Wells Fargo required a title report before lending. The title report showed that the residence was two separate units with separate legal descriptions and tax parcels. Frank testified that Wells Fargo was "not going to approve the financing of this particular transaction once we received the report. I think it was the title company that told us that these were not a single legal unit, but were two separate legal units."

The jury also heard testimony from Kay Lynch, Frank's loan officer. Lynch discussed a letter she wrote to Frank explaining why Wells Fargo could not provide a loan on the home "as it currently exists."

> Q. And "as it currently exists," does that have a referral back up to above about the units not having been legally combined?"
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> [Lynch]. Primarily it's referencing the issue with the title report.
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> Q. The title report just said that there is two units right?
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> A. It had two units, two tax parcel numbers, separate financing, and the underwriters indicated as a result of that, they could not approve the loan.

After Lynch testified, the jury posed a question to her:

> [Trial Court]: Ms. Lynch, the question is, do you know why the underwriters would not approve a loan on these two parcels in this case?
>
> [Lynch]: The explanation given to me by the underwriters was that there were two tax parcels, two tax lot numbers and that

they couldn't have that in a single residence.

The verdict form put the following question to the jury: "Was there negligence by any of the Defendants which was a proximate cause of injury or damage to the Plaintiff?" The jury answered "No" to this question.

After the verdict, juror 8 furnished a declaration disclosing that about half the jury initially felt strongly that the resale certificate "spooked" Dr. Frank from closing, and therefore they believed that Tracy Bates, by her comments in the certificate, contributed to the failure of the deal. The juror said she was persuaded to change her vote from being in favor of Naness to being against him because of statements made by other jurors. According to juror 8, other jurors represented that they had real estate expertise and knew there was no way the deal could have closed in nine days:

> [S]ome jurors said that there was no way that the deal could have closed in 9 days. I said in response, "you don't know that," and was told by other jurors that I don't know the real estate business. In that respect, they were correct. I do not know the real estate business. I am no expert.
> . . . One of the jurors, whose first name was Joyce, had made a list overnight of her reasons that she would not find for the Plaintiff. Her number one reason was that the deal was doomed to fail from the beginning; that it is impossible to close a real estate deal in that short of time. Joyce and another juror by the name of Brian held themselves out as real estate business experts. Brian echoed the thinking of Joyce and said that there was no way that the deal could close that fast.
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> . . . .
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> . . . I never heard any witness in Court say that it was impossible to close a deal in 9 days, but they convinced me that that was so.

Naness moved for a new trial under CR 59(a) based on this declaration. The trial court focused on the juror's assertion that two of the other jurors,

holding themselves out as experts, categorically stated the impossibility of closing a real estate deal in nine days. The court stated that there was no testimony from any witness at trial concerning the impossibility of closing the sale in nine days and that the two jurors had improperly interjected their expert opinions to that effect. Concluding that the jurors' statements "constituted extrinsic evidence and juror misconduct," the court vacated the verdict and granted Naness's motion for a new trial. Canterbury Shores appeals and contends that the statements did not provide extrinsic evidence.

As a general rule, appellate courts are reluctant to inquire into how a jury arrives at its verdict. A strong affirmative showing of misconduct is necessary in order to overcome the policy favoring stable and certain verdicts and the secret, frank, and free discussion of evidence by the jury. Nevertheless, the consideration of novel or extrinsic evidence by a jury is misconduct and can be grounds for a new trial. Novel or extrinsic evidence is defined as information that is outside all the evidence admitted at trial, either orally or by document. Such evidence is improper because it is not subject to objection, cross-examination, explanation, or rebuttal. State v. Balisok, 123 Wn.2d 114, 117-18, 866 P.2d 631 (1994).

There is some controversy between the parties about the standard of review. Naness relies on the principle that deciding whether juror misconduct occurred and deciding whether it affected the verdict are ordinarily matters for the discretion of the trial court. A trial court only abuses its discretion when its

decision is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons. And greater weight is owed the decision to grant a new trial than the decision to deny a new trial. Richards v. Overlake Hosp. Med. Ctr., 59 Wn. App. 266, 271, 796 P.2d 737 (1990), review denied, 116 Wn.2d 1014 (1991). Canterbury Shores, on the other hand, relies on the limitation that no element of discretion is involved when an order granting a new trial is predicated upon a ruling as to the law. State v. Crowell, 92 Wn.2d 143, 145, 594 P.2d 905 (1979); Coleman v. George, 62 Wn.2d 840, 841, 384 P.2d 871 (1963). Canterbury Shores contends that deciding whether matters considered by a jury amount to extrinsic evidence is a question of law that must be reviewed de novo. See Balisok, 123 Wn.2d at 118 (holding that juror reenactment did not constitute extrinsic evidence, without deferring to trial court's ruling). See also Ayers v. Johnson & Johnson Baby Prods. Co., 117 Wn.2d 747, 768, 818 P.2d 1337 (1991) (holding that question of whether jury's voting procedure inhered in the verdict was a question of law to be reviewed without deference to the trial court's decision to grant a new trial).

Canterbury Shores may well be correct in asserting that de novo review is appropriate when a trial court rules that juror comments occurring in deliberations amount to extrinsic evidence. We need not resolve the issue in this case, however, because even under the more deferential abuse of discretion standard of review, we conclude there was not a tenable basis for characterizing the juror comments as extrinsic evidence.

The fundamental obstacle to the sale closing quickly was that the residence, while represented to be one unit, was actually two. When the title report disclosed this fact, the anticipated funding from Wells Fargo became unavailable. This was strong evidence that the deal could never have closed within nine days. The statements of Tracy Bates indicated that in the Board's view, combining the units would require securing a vote of the membership and various other costly and time consuming procedures. But the jury could have easily decided that the sale was doomed from the beginning, with or without the statements of Tracy Bates, simply because there were two units instead of one.

Naness cites Halverson v. Anderson, 82 Wn.2d 746, 513 P.2d 827 (1973), as authority for the proposition that the discussion about how long it takes for a real estate transaction to close was extrinsic evidence. In that case, the plaintiff's attorney did not offer evidence showing future damages, conceding that the plaintiff's career choice was "highly conjectural." Halverson, 82 Wn.2d at 748. Nevertheless, a juror told the other jurors how much the plaintiff could have earned had his complained of injuries not foreclosed a career choice, and the jury awarded damages for loss of future earning capacity. Halverson, 82 Wn.2d at 747. Because the issue of lost earning capacity had not been introduced at trial, any facts about those damages were outside the evidence admitted at trial. Accordingly, the plaintiff's verdict was overturned. In contrast, the jury here was charged with determining whether the statements of Tracy Bates caused the deal between Frank and Naness to fail. Evidence about why

the sale did not close was presented in open court and subject to cross-examination and thus the issue of causation was squarely before the jury. Even though no witness testified in so many words that it was impossible to close the sale within a nine-day deadline, the evidence heard by the jurors provided ample support for reaching such a conclusion.

Jurors are expected to bring their opinions, insights, common sense, and everyday life experiences into deliberations, but they may be introducing extrinsic evidence when they introduce highly specialized knowledge into the deliberations. This was the case in State v. Briggs, 55 Wn. App. 44, 776 P.2d 1347 (1989). During deliberations, a juror presented his personal experience with stuttering, despite his failure to disclose during voir dire that he had any such experience. This court ordered a new trial. "This is evidence outside the realm of a typical juror's general life experience and therefore should not have been introduced into the jury's deliberations." Briggs, 55 Wn. App. at 59.

Naness argues that this case is like Briggs in that the two jurors claimed to have special expertise in real estate. Unlike in Briggs, however, there is no allegation that these jurors concealed any relevant experience during voir dire. Factually, Richards is a closer precedent. In Richards, plaintiffs alleged that their daughter's neurological defects were the result of negligent medical care provided to her as a newborn. The defendant physicians claimed that the condition was a congenital birth defect. A juror with some medical training read the medical records, which were in evidence, and discovered that the mother

had suffered the flu at 20 weeks into the gestation period. This juror told the rest of the jurors that in her opinion, the flu explained that the child's injuries were pre-birth defects. None of the experts had advanced that theory at trial. This court determined that the juror who expressed this opinion was simply using her own experience to draw conclusions from the evidence. Richards, 59 Wn. App. at 274.

This case is like Richards in that the juror statements at issue were opinions deducible from the evidence presented at trial. The jurors did not present information available only to persons with highly specialized backgrounds. It is a commonsense insight, fortified by ordinary personal experience, that a real estate deal will not close quickly if it is conditioned upon an assumption that turns out not to be true. Based on the testimony of Frank and Lynch, the jurors could readily conclude that the transaction was doomed because the residence consisted of two units that had never been legally combined. Because this fact made financing unobtainable, it delayed the closing independent of anything said by Tracy Bates concerning the requirements of the condominium documents.

The trial court lacked a tenable basis for concluding that the jury was exposed to extrinsic evidence. Accordingly, we conclude that the order granting a new trial was an abuse of discretion.

Reversed.

Becker, J.

WE CONCUR:

Ellington, J.

Cox, J.